IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 287

VICTOR RABINOWITZ AND LEONARD B. BOUDIN,
Petitioners,

v.

ROBERT F. KENNEDY, Attorney General of the United States

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY FOR PETITIONERS

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BRIEF FOR PETITIONERS

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REPLY FOR PETITIONERS

I.

In our petition we argued (p. 13) that a proper analysis of the cases would show that, despite some loose language, the Court has applied the doctrine of sovereign immunity only in situations where the suit against a government official was for specific performance

of a government contract, for government funds or for specific property in the possession of the government. We noted also that our contention was supported by the language of this Court in *Malone* v. *Bowdoin*, 369 U.S. 643, by language in some lower court decisions and by commentators in the field (p. 13, fn. 4). Ignoring the authorities cited, the government, like the court below, blandly asserts (Opp. 6) that the doctrine of a suit against the sovereign is not so limited. It adds: "suits against government officials have frequently been held to be suits against the United States, even though property was not involved." But to support this assertion of "frequent" holdings, the government cites only one case in this Court, *Louisiana* v. *McAdoo*, 234 U.S. 627. Although the Court used sovereign immunity language in its decision in this case, the holding in the case was that Congress had vested the Secretary of the Treasury with the unreviewable discretion to set tariff rates.[1]

More significantly, the government entirely ignores the numerous cases cited in our petition in which both

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[1] The other cases cited by the government are all appellate court decisions, and are equally inapposite to prove the government's point. The discussion of sovereign immunity in *Rogers* v. *Skinner*, 201 F. 2d 521, 524 was entirely unnecessary to the decision in the case since the court held that the complaint should be dismissed because the Secretary of Labor was an indispensable party and that the complaint lacked merit in any event. In both *Ainsworth* v. *Barn Ballroom Co.*, 157 F. 2d 97, and *Harper* v. *Jones*, 195 F. 2d 705, the courts held that the judiciary had no competence to review the discretion of a commanding officer in setting certain establishments "off limits" for military personnel. Their use of sovereign immunity language to reach this correct result was both unnecessary and illustrative of the confusion surrounding this doctrine. *Codray* v. *Brownell*, 207 F. 2d 610, was in fact a suit for funds in the possession of the government. Moreover, the court held that the claim was without merit.

this Court and the court below assumed jurisdiction under circumstances which cannot possibly be squared with the sovereign immunity formula as stated by the government.[2] According to the government (Opp. 7-8), a suit may be brought against a government official only where it is claimed that he is acting beyond his statutory authority, but not where the claim is made that the official made a legal error.[3] But the cases in which this Court has assumed jurisdiction simply do not fit within this mold. Thus in *Perkins* v. *Elg*, 307 U.S. 325, there was no question that the Secretary of State had the statutory authority and duty to deny passports to non-citizens. He also had the statutory responsibility to determine whether a particular applicant was or was not a citizen. The only issue in the case was whether or not he had wrongly decided that a particular individual was not a citizen. Nonetheless, this Court took jurisdiction of the case and held that the Secretary had wrongly decided the question. In the employee discharge cases such as *Service* v. *Dulles*, 354 U.S. 363, and *Vitarelli* v. *Seaton*, 359 U.S. 535, there was no question that the head of the department involved had the statutory authority to discharge the employee. The sole question was whether he had complied with the appropriate regulations in doing so (in both cases the regulations involved were those issued by the department head himself). Here too the Court took jurisdiction without even considering the question of sovereign immunity. Similarly in *Shields* v. *Utah*

[2] Although we made no effort to be exhaustive, we cited fifteen such cases in this Court, and nine in the court below. (See citations pp. 11-12 and fn. 10 on p. 16).

[3] As we showed in our petition (pp. 17-19), even under this formulation, petitioners' complaint stated a claim for relief and was not barred by the sovereign immunity doctrine.

Idaho Central R. Co., 305 U.S. 177, the Interstate Commerce Commission clearly had the authority to determine whether the plaintiff railroad was or was not an electric interurban railroad. The only issue was whether the Commission had properly exercised its authority on the facts. Here too the Court took jurisdiction and found that the Commission was not only acting within its authority but had reached the correct conclusion on the facts. Yet under the formula advanced by the opposition and the court below, the case should have been dismissed for lack of jurisdiction.

Obviously, if the statement of law as set forth in the government's opposition is correct, then the Court did not have jurisdiction in any of these cases nor in the numerous other cases cited in our petition and which are completely ignored by the opposition. By ignoring the cases, the opposition proves only that its view of the law and the decided cases simply do not jibe. We submit that it would have been more honest for the government to have stated candidly as it did in its opposition in *Reisman* v. *Caplin*, No. 1084, Oct. Term, 1962, No. 119, this Term, that the holding of the court below that the action was barred by sovereign immunity "admittedly raises questions of some difficulty."

II.

The government suggests (pp. 8-10) that the judgment of the Court of Appeals is sustainable on the alternative ground that the present suit lacked equity since "equity ordinarily will refuse to enjoin a criminal prosecution." As the opposition notes (p. 8), the majority of the court below never considered the equities in the case. As it failed to note, the dissenting

opinion of Judge Fahy did consider this question and it demonstrated quite clearly that the present suit falls within normal equity doctrine.

The opposition is incorrect in stating (p. 9) that the *Shields* case held that it was proper to entertain an equitable action to enjoin a criminal prosecution because the determination of the Interstate Commerce Commission "was not otherwise subject to judicial review." The Court did not say that the Commission's determination could not be reviewed in a criminal prosecution. It said only that it was appropriate to review the determination in an equity action to enjoin the prosecution.[4] Under the authority of the *Shields* case, it is entirely appropriate to review in the present action the determination by the Attorney General that petitioners are required to register under the Foreign Agents Registration Act.

Nor does the present case involve a review of the Attorney General's judgment "on the facts of this particular case" (Opp. 8). The complaint alleges that petitioners represent the Republic of Cuba only in mercantile and financial matters and hence are exempt from registration under the express provisions of the Act (R. 4-7). The answer does not dispute this, stating only that the Attorney General has no knowledge whether petitioners' representation goes beyond the foreign principal's mercantile and financial interests (R. 23). He contends, nevertheless, that even if the representation is so limited, petitioners are required to register. Accordingly, the issue presented on the merits is a simple question of law, i.e., whether attorneys representing a foreign government solely in

[4] See quotation in our petition at p. 9.

mercantile and financial matters are required to register under the Foreign Agents Registration Act.

There is no issue here of evasion or attempted secrecy. Petitioners do not deny that they represent the foreign principal; on the contrary, the complaint pleads that they represent the Republic of Cuba, and the appropriate governmental authorities have been so notified.[5] The issue is to be tried and decided in the same court that would determine any eventual criminal prosecution. There are no equitable or practical considerations that suggest that the issue could be better or more expeditiously or more fairly tried as a criminal matter rather than as a civil one. On the other hand, there is every equitable reason why petitioners should have their rights determined without being subjected to the hazards and hardships of a criminal prosecution.

Respectfully submitted,

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[5] The Court will note that petitioners appear as counsel for the Republic of Cuba in a case pending in this Court, *Banco Nacional de Cuba* v. *Sabbatino et al*, No. 16, this Term.